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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92061257
Party	Defendant Heartland Energy Group, Ltd.
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Date	06/03/2015
Attachments	Motion to Accept Late-Filed Answer (060315).pdf(16249 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

FLUID ENERGY GROUP, LTD.,

Petitioner,

v.

**Cancellation No. 92061257
Registration No. 4224628**

HEARTLAND ENERGY GROUP, LTD.

Registrant.

_____/

MOTION TO ACCEPT LATE-FILED ANSWER AND AFFIRMATIVE DEFENSES

COMES NOW, Registrant, HEARTLAND ENERGY GROUP, LTD., (“HEG” or “Registrant”) by and through its undersigned attorneys and hereby moves for the Board to accept the late-filed Answer and Affirmative Defenses being filed concurrently with this Motion.

As grounds in support of this motion, HEG notes that an Answer was due on May 24, 2015. In lieu of filing its Answer, on May 20, 2015, which was prior to the due date for the Answer, HEG filed a Motion to Suspend Proceedings Pursuant to 37 CFR § 2.117(a). *See* Doc. 4. In filing the Motion to Suspend, HEG satisfied the duty set forth in the Board’s institution order notifying the parties of the formal institution of the proceeding. On page 5 of that order, the Board noted that the parties “must” and “shall” “notify the Board immediately” of other pending actions involving the same marks or facts which are the subject of this proceeding. A review of the Petition for Cancellation in this proceeding, which is the only document filed by the Petitioner, reveals that the Petitioner did not inform this Board of the prior pending arbitration and prior pending civil litigation which directly involve the issues and registered mark

that is the subject of this proceeding. Registrant's May 20, 2015 Motion to Suspend provides additional detail about those pending actions.

Since Petitioner has not filed a response to the Motion to Suspend, and since the deadline for such response is tomorrow (June 4, 2015) in an abundance of caution, Registrant is filing this Motion to Accept its Late-Filed Answer.

As explained at TBMP § 312.01, a defendant may file a motion asking that its late-filed answer be accepted. The standard for avoiding a default based on the failure to file a timely answer is the Fed.R.Civ.P. 55(c) "good cause" standard. The TBMP further explains that "[g]ood cause why default judgment should not be entered against a defendant, for failure to file a timely answer to the complaint, is usually found when the defendant shows that (1) the delay in filing an answer was not the result of willful conduct or gross neglect on the part of the defendant, (2) the plaintiff will not be substantially prejudiced by the delay, and (3) the defendant has a meritorious defense to the action." See TBMP § 312.02. Note 2 to Section 312.02 cites the *Fred Hayman Beverly Hills* case, in which a nine-day delay in filing the answer based on counsel's inadvertent calendar error was deemed "good cause," and the answer was accepted. See *Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556 (TTAB 1991); TBMP § 312.02, Note 2. The defendant in that case also submitted an answer with its motion to the Board to accept the late-filed answer, and the Board noted that the answer was not frivolous and showed that the defendant had a meritorious defense. Additionally, the Board found that the nine-day delay would cause "minimal prejudice" to the plaintiff in that proceeding.

Such is the case in the instant proceeding. HEG's answer was due Sunday, May 24, 2015, which really made it due Monday, May 25, 2015, but because Monday, May 25, 2015 was

a Federal holiday, the answer was due on Tuesday, May 26, 2015. *See* 37 CFR § 2.196. Rather than ignore the deadline, HEG filed a Motion to Suspend, thinking, perhaps erroneously, that it would toll the time to answer. HEG's Answer is being filed in conjunction with this Motion, which is being filed a mere nine days after the due date. As shown in the Answer (and in the Motion to Suspend), HEG has meritorious defenses.

HEG's failure to file its Answer was not the result of willful conduct or gross neglect; the less than two-week delay will not prejudice the Petitioner/plaintiff, especially in light of the pending Motion to Suspend; and, HEG clearly has meritorious defenses in this proceeding. Given these factors (and the fact that Petitioner Fluid failed to also inform the Board of the prior pending actions), HEG respectfully requests that the Board accept the Answer and Affirmative Defenses being filed in conjunction with this Motion.

DATED this 3rd day of June, 2015.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed via U.S. Mail and Electronic mail this 3rd day of June, 2015 to: Benjamin Natter, Esquire, NATTER & NATTER, 501 Fifth Avenue, Suite 808, New York, New York 10017.

/s/ Kevin W. Wimberly
Attorney